INDEX

	Page
Questions Presented	1
Statement of the Case	2
Summary of Argument	3
Argument:	
I. The Standard Of Proof Beyond A Reasonable Doubt Should Not Be Constitutionally Required When State Courts Determine The Admissibility Of Confessions	6
A. There Is No Justification In Precedent Or Policy For Requiring The Prosecution To Prove Beyond A Reasonable Doubt Both The Guilt Of The Defendant And The Constitutional Propriety Of Each Item Of Evidence Tending To Establish Guilt	6
B. Nothing In The Specific Nature Of Confessions Requires That The Reasonable Doubt Standard Apply To The Question Of Admitting Confessions Into Evidence	14
C. Jackson v. Denno Does Not Require The Application Of A Reasonable Doubt Standard To The Determination Of The Admissibility Of A Confession	21
II. There Is No Constitutional Requirement That The Defendant Receive A Jury Trial On The Issue Of The Voluntariness Of His Confession	25
Conclusion	28

Table of Authorities

Cases:

Ballew v. *State*, 249 Ark. ——, 495 S.W. 577 (1970) 15
Boles v. *Stevenson*, 379 U.S. 43 (1964) 21
Booze v. *State*, 390 P. 2d 261 (Okla. 1964) 12
Boykin v. *Alabama*, 395 U.S. 238 (1969) 21
Brady v. *United States*, 397 U.S. 742 (1970) 24
Bruton v. *United States*, 391 U.S. 123 (1968) 27
Brown v. *Walker*, 161 U.S. 591 (1896) 17
Bumper v. *North Carolina*, 391 U.S. 543 (1968) 10
Caruthers v. *State*, 219 Tenn. 21, 406 S.W. 2d 159 (1966) 10
Chapman v. *California*, 386 U.S. 18 (1967) 6, 13
Clifton v. *United States*, 371 F. 2d 354 (D.C. Cir. 1966) 16
Coffin v. *United States*, 156 U.S. 432 (1895) 6
Collins v. *Sullivan*, 319 F. Supp. 184 (Ore. 1970) ... 18
Commonwealth v. *Mayhew*, 297 Ky. 172, 178 S.W. 2d 928 (1943) 16
Commonwealth v. *Polian*, 288 Mass. 494, 193 N.E. 68 (1934) 9
Commonwealth v. *White*, 353 Mass. 409, 232 N.E. 2d 335 (1967) 15
Commonwealth ex rel. Butler v. *Rundle*, 429 Pa. 141, 239 A. 2d 426 (1968) 7, 15
Davis v. *United States*, 160 U.S. 469 (1895) 7
DeStefano v. *Woods*, 392 U.S. 631 (1968) 26
Dodel v. *State*, 232 So. 2nd 235 (Fla. 1970) 16
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 15, 25
Duncan v. *State*, 278 Ala. 145, 176 So. 2d 840 (1965) 15
Edwards v. *Beto*, 446 F. 2d 18 (5th Cir. 1971) ...16, 18

Fernandez v. *Beto*, 281 F. Supp. 207 (N.D. Texas 1968) 16
Fullbright v. *United States*, 392 F. 2d 432 (10th Cir. 1968) *cert. denied* 393 U.S. 830 11
Gardner v. *State*, 10 Md. App. 233, 269 A. 2d 186 (1970) 15
Gilbert v. *California*, 388 U.S. 263 (1967) 12
Harrington v. *Califonia*, 395 U.S. 250 (1969) 13
Harris v. *New York*, 401 U.S. 222 (1971) 9
Holland v. *United States*, 348 U.S. 121 (1954) 7
In re Winship, 397 U.S. 358 (1970) 6, 7
Irby v. *United States*, 314 F. 2d 253 (D.C. Cir. 1963) 10
Jackson v. *Denno*, 378 U.S. 368 (1964) 4, 5, 8, 21, 22, 23, 25, 26, 27
Jarabo v. *United States*, 158 F. 2d 509 (1st Cir. 1946) 11
Johnson v. *United States*, 426 F. 2d 651 (D.C. Cir. 1970) 24, 25
Lee v. *State*, 236 Miss. 716, 112 So. 2d 254 (1959) 16
Leland v. *Oregon*, 343 U.S. 790 (1952) 7, 18
Lopez v. *State*, 384 S.W. 2d 345 (Texas Crim. 1964) 16
McGautha v. *California*, 402 U.S. 183 (1971) 24, 25
McKee v. *State*, 198 Ind. 590, 154 N.E. 372 (1926) .. 9
McMann v. *Richardson*, 397 U.S. 759 (1970) 24
Manuel v. *United States*, 355 F. 2d 344 (5th Cir. 1966) 11
Miranda v. *Arizona*, 384 U.S. 436 (1966) 14
E. J. Monts v. *Henderson*, 409 F. 2d 17 (6th Cir. 1969) 16
Monts v. *State*, 218 Tenn. 31, 400 S.W. 2d 722 (1966) 15

Moore v. *State*, 244 Ark. 1197, 429 S.W. 2d 122 (1968) 12
Morris v. *Boles*, 386 F. 2d 395 (4th Cir. 1967) 18
Moser v. *United States*, 381 F. 2d 363 (9th Cir. 1967) 16
Mullins v. *United States*, 382 F. 2d 258 (4th Cir. 1967) 17
Nardone v. *United States*, 308 U.S. 338 (1939) 11
Nolan v. *United States*, 423 F. 2d 1031 (10th Cir. 1970) 11
North Carolina v. *Alford*, 400 U.S. 25 (1970) 24
Parker v. *North Carolina*, 397 U.S. 790 (1970) 24
Pea v. *United States*, 397 F. 2d 627 (D.C. Cir. 1967) 16, 17
People v. *Albertson*, 23 Cal. 2d 550, 145 P. 2d 7 (1944) 9
People v. *Berrios*, 28 N.Y. 2d 361, 270 N.E. 2d 709 (1971) 11
People v. *Caruso*, 68 Cal. 2d 183, 436 P. 2d 336 (1968) 12
People v. *Ferguson*, 376 Mich. 90, 135 N.W. 2d 537 (1965) 11
People v. *Golson*, 32 Ill. 2d 398, 207 N.E. 2d 68 (1965) *cert. denied* 384 U.S. 1023 15
People v. *Huntley*, 15 N.Y. 2d 72, 204 N.E. 2d 179 (1965) 16
People v. *Johnson*, —— Cal. App. 3d ——, 95 Cal. Rptr. 316 (1971) 10
People v. *Johnson*, 45 Ill. 2d 38, 257 N.E. 2d 3 (1970) 12
People v. *Lego*, 32 Ill. 2d 76, 203 N.E. 2d 875 (1965) 3
People v. *Ludkowitz*, 266 N.Y. 223, 194 N.E. 688 (1935) 9

People v. *Luna*, 37 Ill. 2d 299, 226 N.E. 2d 586 (1967) 23
People v. *Morales*, 263 Cal. App. 2d 368, 69 Cal. Rptr. 402 (1968) 10
People v. *Nelson*, 40 Ill. 2d 378, 238 N.E. 2d 378 (1968) 12
People v. *Rodriguez*, 10 Cal. App. 3d 18, 88 Cal. Rptr. 789 (1970) 12
People v. *Stroud*, 273 Cal. App. 2d 570, 78 Cal. Rptr. 270 (1969) 16
People v. *Wright*, 42 Ill. 2d 457, 248 N.E. 2d 78 (1969) 11
Pierce v. *United States*, 252 U.S. 239 (1920) 24
Ragland v. *State*, 238 Ala. 587, 192 So. 498 (1939) 9
Ralph v. *Warden*, 438 F. 2d 786 (4th Cir. 1970) 17
Rogers v. *Richmond*, 365 U.S. 534 (1965) 18
Scott v. *State*, 107 Ohio 475, 141 N.E. 19 (1923) .. 9
Simmons v. *United States*, 390 U.S. 377 (1968) 23
Sims v. *Georgia*, 389 U.S. 404 (1967) 14, 21
Smith v. *State*, 249 N.E. 2d 493 (Ind. 1969) 16
Speiser v. *Randall*, 357 U.S. 513 (1958) 6
State v. *Brewton*, 238 Ore. 590, 395 P. 2d 874 (1964) 15
State v. *Brewton*, 238 Ore. 590, 344 F. 2d 744 (1959) 9
State v. *Clybourn*, 273 N.C. 284, 159 S.E. 2d 868 (1968) 16
State v. *Crank*, 105 Utah 332, 142 P. 2d 178 (1943) 15
State v. *Davis*, 73 Wash. 2d 271, 438 P. 2d 185 (1968) 15
State v. *Dillon*, 93 Idaho 698, 471 P. 2d 553 (1970) .. 15

State v. *Elias*, 205 Minn. 156, 285 N.W. 475 (1939) 9
State v. *Freese*, 166 N.W. 2d 785 (Iowa 1969) 12
State v. *Hall*, 1 Ohio App. 2d 297, 204 N.E. 2d 557 (1964) 12
State v. *Holt*, 415 S.W. 2d 761 (Mo. 1967) 11
State v. *Keiser*, 274 Minn. 265, 143 N.W. 2d 75 (1966) 16
State v. *Longmore*, 178 Neb. 509, 139 N.W. 2d 66 (1965) 16
State v. *Merrill*, 82 S.D. 609, 152 N.W. 2d 349 (1967) 12
State v. *Milow*, 199 Kan. 576, 433 P. 2d 538 (1967) .. 15
State v. *Monich*, 74 N.J. 152, 64 A. 1016 (1906) 9
State v. *Nolan*, 423 S.W. 2d 815 (Mo. 1968) 15
State v. *Pokini*, 45 Haw. 295, 367 P. 2d 499 (1961) 12
State v. *Pulliam*, 87 Ariz. 216, 349 P. 2d 781 (1960) 15
State v. *Ragsdale*, 249 La. 420, 187 So. 2d 427 (1966), *cert. denied* 385 U.S. 1029 (1967) 16
State v. *Thundershield*, 83 S.D. 414, 160 N.W. 2d 408 (1968) 16
State v. *Towles*, 155 Conn. 516, 235 A. 2d 639 (1967) 12
State v. *Waits*, 1 Ariz. App. 463, 404 P. 2d 729 (1965) 10
State v. *White*, 146 Mont. 226, 405 P. 2d 761 (1965), *cert. denied* 384 U.S. 1023 15
State v. *Yough*, 49 N.J. 587, 231 A. 2d 598 (1965) 16, 17
State ex rel. Goodchild v. *Burke*, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965) *cert. denied* 384 U.S. 1017 (1966) 16
Stovall v. *Denno*, 388 U.S. 293 (1967) 12, 26
Tillotson v. *United States*, 231 F. 2d 736 (D.C. Cir. 1956) 14

Tucker v. *State*, 82 Nev. 127, 412 P. 2d 970 (1966) .. 10
United States v. *Cleaver*, 402 F. 2d 148 (9th Cir. 1968) 10
United States v. *Elliott*, 437 F. 2d 1253 (5th Cir. 1971) 10
United States v. *Feinberg*, 140 F. 2d 592 (2nd Cir. 1944), *cert. denied* 322 U.S. 726 24
United States v. *Ferrone*, 438 F. 2d 381 (3rd Cir. 1971) 11
United States v. *Halbert*, 436 F. 2d 1226 (9th Cir. 1970) 14
United States v. *Inman*, 352 F. 2d 954 (4th Cir. 1965) 16, 17
United States v. *Morin*, 378 F. 2d 472 (2nd Cir. 1967) 11
United States v. *O'Leary*, 201 F. Supp. 926 (E.D. Tenn. 1961) 11
United States v. *Panepinto*, 430 F. 2d 613 (3rd Cir. 1970) 26
United States v. *Poppitt*, 227 F. Supp. 73 (Del. 1964) 11
United States v. *Sacco*, 436 F. 2d 780 (2nd Cir. 1971) 11
United States v. *Schipani*, 289 F. Supp. 43 (E.D. N.Y. 1968) 7, 13, 20
United States v. *Thompson*, 421 F. 2d 373 (5th Cir. 1970) 10
United States v. *Wade*, 388 U.S. 218 (1967) 12
United States ex rel. Heath v. *Rundle*, 298 F. Supp. 1207 (E.D. Pa. 1969) 15
United States ex rel. Lego v. *Pate*, 308 F. Supp. 38 (N.D. Ill. 1970) 3
Wakaksaw v. *United States*, 367 F. 2d 639 (8th Cir. 1966) 16

Watson v. *United States*, 249 F. 2d 106 (D.C. Cir. 1957) 11
Williams v. *Florida*, 399 U.S. 78 (1970) 25
Wilson v. *United States*, 218 F. 2d 754 (10th Cir. 1955) 11

STATUTE:

Illinois Revised Statutes, Ch. 38, Sec. 114-11 (d) 15

MISCELLANEOUS:

3 Wigmore, *Evidence*, § 861 (3rd Ed. 1940) 25
9 Wigmore, *Evidence*, § 2497 7
9 Wigmore, *Evidence*, § 2550 9
3 Wigmore, *Evidence*, § 861 (Chadbourn Rev. 1970) 25
Illinois Pattern Instructions—Criminal 3.07 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5037

DON RICHARD LEGO,

Petitioner,

vs.

JOHN TWOMEY, Warden,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Whether a standard other than proof beyond a reasonable doubt may constitutionally be utilized by a trial court making a determination of the voluntariness of a confession upon a motion to suppress.

Whether the defendant in a criminal case has a constitutional right to have the voluntariness of his confession decided by the trial jury even though the question of voluntariness has previously been reliably determined by the trial court.

STATEMENT OF THE CASE

The petitioner was convicted of the offense of armed robbery after trial by a court and jury. The verdict was returned on February 24, 1961 and the Circuit Court fixed sentence at a penitentiary term of twenty-five to fifty years.

Prior to trial, petitioner filed a motion to suppress his confession on the grounds that it was not voluntarily made. (App. 23-24). The trial court held a full pre-trial hearing on the issue of voluntariness. Allegations of physical violence were made and rebutted by police officers.* At the end of the hearing the trial court concluded that "I don't believe the defendant's testimony at all that he was beaten up by the Police." (App. 25).

Upon trial by the jury, the petitioner testified and attacked the validity of his confession.

Following conviction, petitioner appealed directly to the Supreme Court of Illinois alleging error in the failure to conduct a competency hearing, in the determination on the merits of the issue of voluntariness, in the

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*The petitioner discusses some of the details of the evidence at the hearing, presumably to show that since the facts were in dispute, the burden of proof might be significant. (Petr's Br. 7-8). To avoid confusion we note here that the issue of voluntariness is not before this Court. It is significant that the voluntariness of the statement has been previously litigated in federal court and the issue found against petitioner. See United States ex rel. Lego v. Pate, (No. 66, C 129, United States District Court for the Northern District of Illinois, Eastern Division) (unreported). We also note that, in light of the trial Judge's assessment of the credibility of the defendant's contested evidence, it is doubtful that the burden of proof is significant in this case.

determination of the issue of voluntariness in the absence of allegedly material witnesses and the comments of the trial court. The Supreme Court reached the issues on their merits and affirmed the judgment. *People* v. *Lego,* 32 Ill. 2d 76, 203 N.E. 2d 875 (1965). Neither of the issues presented to this Court were decided on petitioner's direct appeal to the Supreme Court of Illinois. After affirmance, petitioner unsuccessfully sought state post-conviction relief but did not appeal the denials of relief.

On April 8, 1968, petitioner sought relief by filing a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. Eventually the District Court considered the merits of petitioner's claims and ruled against them. *United States ex rel. Lego* v. *Pate,* 308 F. Supp. 38 (N.D. Ill. 1970). On October 8, 1970, the Court of Appeals affirmed the District Court, adopting the reasons given in Judge Will's opinion. On March 29, 1971 this Court granted certiorari.

SUMMARY OF ARGUMENT

The standard of proof of guilt beyond a reasonable doubt is designed to protect the innocent. The standard is applied to the evidence as a whole to determine whether the elements of the crime are proved beyond a reasonable doubt. The standard does not apply to the proof of each individual evidentiary fact nor does it govern the question of admissibility of evidence. The contention that the prosecution should be required to establish the constitutional validity of its evidence by proof beyond a reasonable doubt is inconsistent with existing precedent which, in many instances, places the

burden of proof upon defendant to establish his right to exclusion of evidence. More importantly, the exclusionary rules are not primarily intended as a safeguard against the erroneous conviction of the innocent. The application of the reasonable doubt standard to the exclusionary rules will not serve the fundamental purposes underlying that standard. Therefore, there is no justification in the language or the policy of the reasonable doubt rule that requires its application to motions to suppress.

The particular nature of confessions does not require an exception to the general rule that questions of admissibility of evidence are not to be judged by the reasonable doubt standard. The interests protected by other exclusionary rules of evidence relating to search and seizure and eyewitness testimony are as important as those served by the voluntary confessions rule. Moreover, there is no evidence that confessions are intrinsically more damaging than other forms of evidence and good reason to suspect they are not.

The criminal defendant in Illinois is not in a tactically less desirable position than the defendant in *Jackson* v. *Denno*, 378 U.S. 368 (1964). The Illinois defendant is guaranteed a separate hearing on the issue of voluntariness in which the issue is considered isolated from the question of his guilt and, if he prevails, the confession is never heard by the jury. This is far different from the situation in *Jackson* where the effect of the procedure was to deny defendants a separate hearing on the issue of voluntariness. Even if the Illinois procedure presents difficulties for defendants the relative tactical benefits of two differing procedures is not an appropriate criterion for deciding whether either is in conformity with the Constitution. Finally, the defendant in Illinois is not subjected to an unconstitutionally hard choice in

deciding whether to testify at trial concerning a confession admitted after a court finding of voluntariness. His choice is less difficult to make than the decision faced under the procedures approved by this Court with respect to pleas of guilty, discovery against the defense, and sentencing in capital cases.

At common law the jury did not decide questions of admissibility of evidence and the Constitution does not require more of the States than the granting of a common law jury trial. Consequently, the Constitution does not require that a jury trial be held on the issue of the admissibility of a confession. More importantly, it is a basic tenet of *Jackson* v. *Denno* that a jury cannot properly consider the issue of voluntariness and a jury ought not to be asked to decide a question it is incapable of deciding.

ARGUMENT

I.

THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT SHOULD NOT BE CONSTITUTIONALLY REQUIRED WHEN STATE COURTS DETERMINE THE ADMISSIBILITY OF CONFESSIONS.

A.

There Is No Justification In Precedent Or Policy For Requiring The Prosecution To Prove Beyond A Reasonable Doubt Both The Guilt Of The Defendant And The Constitutional Propriety Of Each Item Of Evidence Tending To Establish Guilt.

The requirement of proof of guilt beyond a reasonable doubt is essentially a safeguard against convicting the innocent.[1] "It is the prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). The standard arises out of concern over potential error in factfinding on questions of guilt [*Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958)] and is reflective of the presumption of innocence [*Coffin* v. *United States*, 156 U.S. 432, 453 (1895)].

The reasonable doubt standard requires proof of "every element of the offense charged beyond a reasonable

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1. It is worth noting that petitioner seems to agree. He relies in his first argument on In Re Winship, 397 U.S. 358 (1970) and Chapman v. California, 386 U.S. 18 (1967) and says of these two cases: "Essentially, they come down to the proposition that 'we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty' 397 U.S. at 372" (Petr's Br. 11).

doubt. . . ." *Holland* v. *United States,* 348 U.S. 121, 138 (1954). The question of proof beyond a reasonable doubt as to all the elements or facts necessary to constitute the crime (*In re Winship,* 397 U.S. at 366) is to be considered in light of all the evidence in the case. *Davis* v. *United States,* 160 U.S. 469, 484 (1895), See *Leland* v. *Oregon,* 343 U.S. 790, 800 (1952).

The petitioner misreads the reasonable doubt rule and argues that it requires that *all* of the facts proved by the prosecution be established beyond a reasonable doubt. This is inconsistent with the settled rule that the "measure of reasonable doubt need not be applied to the specific detailed facts, but only to the whole issue." 9 Wigmore, *Evidence,* § 2497, P. 324 (3rd Ed. 1940); *Commonwealth ex rel. Butler* v. *Rundle,* 429 Pa. 141, 239 A. 2d 426 (1968). Indeed, most of the *facts* concerning the acquisition and admissibility of evidence are not even relevant to the question of guilt and are not ordinarily presented to the trier of fact.

In *United States* v. *Schipani,* 289 F. Supp. 43, 57 (E.D. N.Y. 1968), the principal case cited by petitioner, the court said that the question was one of choosing a proper standard among two alternatives: (a) proof beyond a reasonable doubt by evidence properly admitted in the trial or (b) proof beyond a reasonable doubt by legally obtained evidence. We do not pause to discuss which choice is correct because both alternatives are inappropriate.

Neither the question of proper admission of evidence nor the question of its acquisition are related to the operation of the reasonable doubt rule applied by a trier of fact. The trier of fact must decide whether on all the evidence before it, the defendant has been proven

guilty beyond a reasonable doubt. It is not the concern of the trier of fact whether the evidence before it is properly admitted. Doubt has been expressed as to whether a jury can reasonably be expected to consider questions as to the admissibility of evidence it has heard.[2] See *Jackson* v. *Denno*, 378 U.S. 368, 383 (1964).

The basic contention of the petitioner that the prosecution must prove beyond a reasonable doubt that its evidence was lawfully acquired[3] is faulty for another reason. The exclusionary rules are designed primarily to deter misconduct by law officers. The exclusionary rules are not designed to protect the innocent so much as they are intended to influence official practices. The purpose served by the reasonable doubt standard is protection of the in-

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2. This does not mean that a trier of fact may not also be asked to decide questions of admissibility. But even if this practice is adopted it is clear that the question of admissibility is different from the question of guilt. And at least part of the teaching of Jackson v. Denno, 378 U.S. 368 (1964) is that these questions must be separately considered.

3. The petitioner's position on this point is not completely manifest since he seems first to rely on a reasonable doubt rule and then shifts to the lesser standard of clear and convincing evidence. He states:

> "The Winship and Chapman decisions, in combination, require that the reasonable-doubt standard be applied to all preliminary factual determinations regarding prosecution evidence that has been allegedly obtained by unconstitutional means. For if a lesser standard of proof is permitted at this juncture, the constitutional assurance can be undermined by preliminary determinations on admissibility made on proof which is less than clear and convincing." (Petr's Br. 12).

nocent. The differing purposes served by the two rules are consistently overlooked by petitioner. And it is clear that as important as the purposes the exclusionary rules may be thought to serve, they are not nearly so significant as the protection against an erroneous judgment of guilt. Cf. *Harris* v. *New York*, 401 U.S. 222 (1971). In practical terms it is difficult to see for example how the use of illegally wiretapped conversations concerning disposition of stolen jewels violates any safeguard "against conviction of an innocent man." (Petr's Br. 14).

The existing precedent is inconsistent with petitioner's theories. Ordinarily the court will hear arguments and take evidence, if necessary, before it rules on disputed questions of evidence. But "the rule of reasonable doubt has here no possible application . . ." 9 Wigmore, Evidence, § 2550, p. 503, n. 6 (3rd Ed. 1940). There are isolated categories where such proof is required but even these cases represent minority viewpoints.[4] There are

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4. Though some courts may require that the validity of dying declarations be established beyond a reasonable doubt, most courts adopt lesser standards. See Commonwealth v. Polian, 288 Mass. 494, 193 N.E. 68 (1934) (preponderance), State v. Monich, 74 N.J. 522, 64 A. 1016 (1906) (supported by "any legal evidence"); State v. Brewton, 238 Ore. 590; 344 P. 2d 744 (1959) (any evidence); People v. Ludkowitz, 266 N.Y. 223, 194 N.E. 688 (1935) (clearly established to court's satisfaction); State v. Elias, 205 Minn. 156, 285 N.W. 475 (1939) (proved to court's satisfaction); McKee v. State, 198 Ind. 590, 154 N.E. 372 (1926) ("clearly established"); Ragland v. State, 238 Ala. 587, 192 So. 498 (1939) ("reasonably satisfy" the court).

Evidence of other crimes need not meet the reasonable doubt standard. See Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (1923); People v. Albertson, 23 Cal. 2d 550, 145

many evidentiary rulings of vital importance in criminal trials where the prosecution's burden is less than proof beyond a reasonable doubt.

For example the prosecution need not prove the existence of a conspiracy beyond a reasonable doubt in order to secure the admission of highly damaging out-of-court statements by alleged co-conspirators. See *United States* v. *Elliott*, 437 F. 2d 1253, 1255 (5th Cir. 1971); *People* v. *Morales*, 263 Cal. App. 2d 368, 375-76; 69 Cal. Rptr. 402 (1968), *cert. denied* 393 U.S. 1104. The question of whether a witness is an accomplice may mean the difference between conviction and a directed verdict but the prevailing rule places the burden on defendant to prove that the witness is an accomplice. See *People* v. *Johnson*, —— Cal. App. 3d ——, 95 Cal. Rptr. 316, 318-19 (1971) (cases cited therein).

Examination of the burden of proof in constitutional exclusionary rule cases does not alter this perspective. This Court has dealt only rarely with burden of proof on motions to suppress but it has never imposed a reasonable doubt standard.

Under *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968) the prosecution bears the burden of persuasion when it relies on consent to justify a search. However, under federal rules, the defendant bears the burden of proving the illegality of a seizure of evidence pursuant to warrant. See *United States* v. *Thompson*, 421 F. 2d 373, 377 (5th Cir. 1970); *United States* v. *Cleaver*, 402 F. 2d 148 (9th Cir. 1968); *Irby* v. *United States*, 314 F. 2d

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P. 2d 7 (1944); State v. Waits, 1 Ariz. App. 463, 404 P. 2d 729 (1965); Caruthers v. State, 219 Tenn. 21, 406 S.W. 2d 159 (1966) See also Tucker v. State, 82 Nev. 127, 412 P. 2d 970 (1966) ("plain, clear and convincing evidence").

251, 253 (D.C. Cir. 1963).[5] Under federal rules the defendant must prove that he has standing to object to an illegal seizure. *United States* v. *Sacco*, 436 F. 2d 780, 784 (2nd Cir. 1971); *Fullbright* v. *United States*, 392 F. 2d 432, 435-36 (10th Cir. 1968), *cert. denied* 393 U.S. 830. A federal defendant must prove that wiretapping was unlawfully employed against him in order to secure suppression of wiretap evidence. *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *Nolan* v. *United States*, 423 F. 2d 1031, 1041 (10th Cir. 1970). A defendant claiming abuse of civil summons must prove that no proper civil purpose underlay the summons. *United States* v. *Ferrone*, 438 F. 2d 381, 387-88 (3rd Cir. 1971). Most significantly, even where the prosecution bears the burden on motions to suppress physical evidence, the burden is not that of reasonable doubt. *Manuel* v. *United States*, 355 F. 2d 344, 346 (5th Cir. 1966).

Many states provide that on motions to suppress seized evidence the burden of proving illegal seizure is, in all cases, except consent search, borne by the defendant. See *People* v. *Berrios*, 28 N.Y. 2d 361, 270 N.E. 2d 709, 712-14 (1971); *People* v. *Wright*, 42 Ill. 2d 457, 248 N.E. 2d 78 (1969); *People* v. *Ferguson*, 376 Mich. 90, 135 N.W. 2d 537 (1965); *State* v. *Holt*, 415 S.W. 2d 761, 764-65 (Mo.

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5. There are several federal cases seemingly holding that the burden of proof is upon defendant to establish the illegality of any challenged seizure but these cases do not seem to represent the prevailing federal rule. See United States v. Morin, 378 F. 2d 472, 475 (2nd Cir. 1967); Watson v. United States, 249 F. 2d 106, 108 (D.C. Cir. 1957); Wilson v. United States, 218 F. 2d 754, 757 (10th Cir. 1955); Jarabo v. United States, 158 F. 2d 509, 513 n. 3 (1st Cir. 1946); United States v. O'Leary, 201 F. Supp. 926, 929 (E.D. Tenn 1961). Cf. United States v. Poppitt, 227 F. Supp. 73, 80-81 (Del. 1964).

1967); *State* v. *Freese*, 166 N.W. 2d 785, 787 (Iowa 1969); *State* v. *Toules*, 155 Conn. 516, 235 A. 2d 639, 640 (1967); *Moore* v. *State*, 244 Ark. 1197, 429 S.W. 2d 122, 125 (1968); *State* v. *Merrill*, 82 S.D. 609, 152 N.W. 2d 349, 351 (1967); *State* v. *Pokini*, 45 Haw. 295, 367 P. 2d 499, 505 (1961); *Booze* v. *State*, 390 P. 2d 261, 265-66 (Okla. 1964); *State* v. *Hall*, 1 Ohio App. 2d 297, 204 N.E. 2d 557, 559-60 (1964).

Of special interest are the "lineup" cases. In *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) this Court established a right to counsel at lineups and in *Stovall* v. *Denno*, 388 U.S. 293 (1967) recognized a due process right to non-suggestive lineups. In dealing with burdens of proof the Court held that even where there was an illegal lineup, the prosecution could still introduce an in-court identification upon clear and convincing proof that there was an independant basis for such an identification. The burden of proof beyond a reasonable doubt is not required even where there is a clearly established primary illegality. Moreover, the Court was silent on the issue of who bears the burden of proof as to primary illegality. Two states that have explictly decided that question are in agreement that this burden is on the defendant. *People* v. *Caruso*, 68 Cal. 2d 183, 184; 436 P. 2d 336 (1968); *People* v. *Rodriguez*, 10 Cal. App. 3d 18, 88 Cal. Rptr. 789, 796 (1970); *People* v. *Nelson*, 40 Ill. 2d 378, 238 N.E. 2d 378 (1968); *People* v. *Johnson*, 45 Ill. 2d 38, 257 N.E. 2d 3 (1970).

Simply stated, the petitioner's first argument that the prosecution must prove beyond a reasonable doubt that its evidence was lawfully acquired is obviously inconsistent with the pattern of decided cases in this country. It

is unsupported by the policies or the precedents requiring proof of guilt beyond a reasonable doubt. In fact, the only decison on which petitioner relies did not even consider the question of whether such a standard was constitutionally required. See *United States* v. *Schipani*, 289 F. Supp. at 59.

To the extent petitioner relies on *Chapman* v. *California*, 386 U.S. 18 (1967) his reliance seems misplaced. *Chapman* dealt with the problem of the effect of an admitted violation of constitutional rights and sought to prescribe a standard for determining its effect on a trial. *Chapman* gives no guidance as to what rules must be applied in determining whether error did occur. Presumably *Chapman* would not change the federal rule requiring a defendant to prove that a seizure pursuant to a warrant was illegal. *Chapman* would guide the determination of whether the introduction of the seized matter was harmless in a case where the trial court erroneously ruled that the defendant had not sustained his burden of proof.

The petitioner regards *Chapman* as indicative of the importance of protecting against infringements of federal rights. In truth, *Chapman* was significant because it refused to sanction the idea that constitutional infringements can never be held harmless. The extent to which *Chapman* allows a finding of harmless error has been viewed broadly by this Court, so broadly that some have claimed that the restrictions in *Chapman* were overruled. See *Harrington* v. *California*, 395 U.S. 250, 255 (1969) (dissenting opinion).

Lastly, it must be noted that the imposition of a reasonable doubt standard for all questions of exclusion of evidence would add substantial burdens to the existing

criminal justice system and would add these burdens despite the fact that the questions involved do not serve to improve or refine the essential function of that system —the proper resolution of questions of guilt and sentence.

B.

Nothing In The Specific Nature Of Confessions Requires That The Reasonable Doubt Standard Apply To The Question Of Admitting Confessions Into Evidence.

This Court has rarely decided questions of the burden of proof on confession issues. In *Miranda* v. *Arizona* 384 U.S. 436, 475 (1966) the Court held that the prosecution bears a heavy burden to prove waiver of rights but it does not require the prosecution to bear other significant burdens, i.e. proving that the interrogation was non-custodial or that a statement was volunteered. It is generally conceded that the defendant bears the burden of proving a violation of *McNabb-Mallory*. See *United States* v. *Halbert*, 436 F. 2d 1226, 1230 (9th Cir. 1970); *Tillotson* v. *United States*, 231 F. 2d 736 (D.C. Cir. 1956).

In *Sims* v. *Georgia*, 389 U.S. 404 (1967) the petitioner apparently had the initial burden of proof and the error in the case was not said to be the placing of a burden on the accused but rather the failure to rebut the accused's evidence. 389 U.S. at 406. *Sims* is consistent with placing an initial burden, and perhaps even an ultimate burden of proof upon the accused who seeks to suppress his confession. *Sims* was essentially a case in which the burden was met.

The question of whether an accused may bear any burden with respect to suppression of confessions is

not, however, before the Court in this case. Illinois requires the prosecution to bear "the burden of going forward with the evidence and the burden of proving the confession . . . voluntary." The defendant is entitled to insist that the prosecution call all material witneses. This procedure was basically the one under which petitioner was tried. Illinois Annotated Statutes, Ch. 38, Sec. 114-11 (d) (Smith-Hurd) (1964).

Several courts have considered the question of burden of proof on the issue of voluntariness. The majority of jurisdictions adopt standards less than reasonable doubt although several courts have reached a contrary result.[6]

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6. The cases specifically adopting a standard less than reasonable doubt are: People v. Golson, 32 Ill. 2d 398, 207 N.E. 2d 68 (1965) cert. denied 384 U.S. 1023 (preponderance); Commonwealth ex rel. Butler v. Rundle, 429 Pa. 141, 239 A. 2d 426 (1968) (same); Ballew v. State, 249 Ark. ——, 459 S.W. 2d 577 (1970) (same); Monts v. State, 218 Tenn. 31, 400 S.W. 2d 722 (1966) (same); State v. Dillon, 93 Idaho 698, 471 P. 2d 553 (1970) (same); State v. Davis, 73 Wash. 2d 271, 438 P. 2d 185 (1968) (same); United States ex rel. Heath v. Rundle, 298 F. Supp. 1207 (E.D. Pa. 1969); Gardner v. State, 10 Md. App. 233, 269 A. 2d 186 (1970) (prima facie proof of voluntariness); Duncan v. State, 278 Ala. 145, 176 So. 2d 840 (1965) (same); State v. Nolan, 423 S.W. 2d 815 (Mo. 1968) (same); Commonwealth v. White, 353 Mass. 409, 232 N.E. 2d 335 (1967) (Satisfaction of court as to voluntariness); State v. White, 146 Mont. 226, 405 P. 2d 761 (1965) cert. denied 384 U.S. 1023 (same); State v. Brewton, 238 Ore. 590, 395 P. 2d 874 (1964); State v. Crank, 105 Utah 332, 142 P. 2d 178 (1943) (same); State v. Pulliam, 87 Ariz. 216, 349 P. 2d 781 (1960). See also State v. Milow, 199 Kan. 576, 433 P. 2d 538 (1967) (issue of admissibility decided by same rules that govern other preliminary matters).

There is little if any authority that the reasonable doubt standard is constitutionally required.[7] In the principal

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Many jurisdictions never specifically deal with burden of proof but it is clear that the standard is less than reasonable doubt. The usual rule leaves the decision to the trial court whose ruling need only be supported by the record. E.g. Monts v. Henderson, 409 F. 2d 17 (6th Cir. 1969); Moser v. United States, 381 F 2d 363 (9th Cir. 1967); Wakaksaw v. United States, 367 F. 2d 639 (8th Cir. 1966); State v. Clybourn, 273 N.C. 284, 159 S.E. 2d 868 (1968); Dodel v. State, 232 So. 2d 235 (Fla. 1970); Smith v. State, 249 N.E. 2d 493 (Ind. 1969).

The cases adopting a reasonable doubt standard are: United States v. Inman, 352 F. 2d 954 (4th Cir. 1965); Pea v. United States, 397 F. 2d 627 (D.C. Cir., 1968); State v. Ragsdale, 249 La. 420, 187 So. 2d 427 (1966) cert. denied 385 U.S. 1029 (1967); State v. Keiser, 274 Minn. 265, 143 N.W. 2d 75 (1966); Lee v. State, 236 Miss. 716, 112 So. 2d 854 (1959); State v. Longmore, 178 Neb. 509, 139 N.W. 2d 66 (1965); State v. Yough, 49 N.J. 587, 231 A. 2d 598 (1965); People v. Huntley, 15 N.Y. 2d 72, 204 N.E. 2d 179 (1965); State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965) cert. denied 384 U.S. 1017 (1966); State v. Thundershield, 83 S.D. 414, 160 N.W. 2d 408 (1968); Lopez v. State, 384 S.W. 2d 345 (Texas Crim. 1964); Commonwealth v. Mayhew, 297 Ky. 172, 178 S.W. 2d 928 (1943); People v. Stroud, 273 Cal. App. 2d 670; 78 Cal. Rptr. 270 (1969) (noting that the California Supreme Court has not decided the question); Compare Fernandez v. Beto, 281 F. Supp. 207 (N.D. Texas 1968) with Edwards v. Beto, 446 F. 2d 18 (5th Cir. 1971).

7. One judge has expressed the view that the reasonable doubt standard is constitutionally required. See Clifton v. United States, 371 F. 2d 354, 360 (D.C. Cir. 1966) (concurring opinion). The view was largely if not completely on the premise that the voluntariness requirement is not a mere rule of evidence. 371 F. 2d at 361.

case cited by petitioner, *Pea* v. *United States*, 397 F. 2d 627, 637 (D.C. Cir. 1967), the court expressly grounded its decision on the exercise of supervisory power. See 18 U.S.C., §§ 3501, 3502 (Congressional provisions for admission of confessions); *State* v. *Yough*, 49 N.J. 587, 231 A. 2d 598, 605 (1965).

It is especially significant that the court to which the decision in *Pea* looked for authority has itself explicitly rejected the proposition that the reasonable doubt standard is constitutionally required. In *Pea* the court relied heavily on *United States* v. *Inman*, 352 F. 2d 954 (4th Cir. 1965) which had adopted a reasonable doubt standard. However in *Ralph* v. *Warden*, 438 F. 2d 786, 793 (4th Cir. 1970) the Fourth Circuit said:

> "Ralph now argues that admission of his confession violated the Fifth and Fourteenth Amendments because the court did not find it voluntary beyond a reasonable doubt. This standard, he claims, is required by *United States* v. *Inman*, 352 F. 2d 954 (4th Cir. 1965), and *Mullins* v. *United States*, 382 F. 2d

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The opinion cited Brown v. Walker, 161 U.S. 591, 596-97 (1896) which said of the privilege against self-incrimination "[This] maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of constitutional enactment." It is apparent that the opinion misconstrued Brown v. Walker. Constitutional enactment does make a rule relatively more impregnable than ordinary legal rules. It does not change the nature of the rule itself, it only makes the repeal of the rule more difficult. The power of Congress "To Establish Post Offices and Post Roads" (Art. I, Sec. 8) is clothed with the "impregnability" of constitutional enactment but the nature of the power and the purposes served by its exercise are no different than if the power were non-constitutional in origin, i.e., resting on statutes enacted under the Commerce Clause.

> 258 (4th Cir. 1967), which hold that federal courts in this circuit must find a confession voluntary beyond a reasonable doubt before allowing its presentation to the jury. By their own terms these cases are distinguishable. As we reiterated in *Morris* v. *Boles*, 386 F. 2d 395, 402 (4th Cir. 1967), these cases do not 'prescribe a rule of constitutional application to prosecutions in state courts within this Circuit.' Instead, they rest on our supervisory power over district courts."

See also *Edwards* v. *Beto*, 446 F. 2d 18 (5th Cir. 1971); *Collins* v. *Sullivan*, 319 F. Supp. 184 (Ore. 1970) *Cf. Leland* v. *Oregon*, 343 U.S. 790, 798 (1952).

The petitioner's position in this matter is twofold. His first argument was that the prosecution must prove beyond a reasonable doubt that all of its evidence was constitutionally acquired. His second argument is that even if his first premise fails, the special nature of confessions requires the application of a reasonable doubt standard.

Petitioner contends that the values which underlie the confession rule are more numerous or more important than the values underlying other exclusionary rules. These factors he states are deterrence of police misconduct, unreliability of involuntary admissions and the preservation of the specific guarantees of the fifth amendment privilege against self-incrimination.

This list of factors underlying the confession rule is at least partially incorrect. It is true that probable unreliability of involuntary admissions was mentioned in some early confession cases but in *Rogers* v. *Richmond*, 365 U.S. 534, 540-41 (1965) the Court said:

> ". . . convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions

> are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitional system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

The Court further held that voluntariness cannot be judged by reference to a legal standard which took into account the circumstances of probable truth or falsity. See 365 U.S. at 543-44.

It is apparent that deterrence of police misconduct and the specific guarantees of the fifth amendment are now the underpinnings of the involuntary confession rules. Yet the same sort of purposes are served by the fourth amendment exclusionary rules and unless one is prepared to state that fifth amendment rights are vastly more important than fourth amendment rights, there is no reason to apply more stringent rules in confession cases than are applied in search cases. In the case of eyewitness identification exclusionary rules, the same purpose of deterrence of police misconduct is served as well as the protection of the sixth amendment right to counsel. Indeed, those exclusionary rules are grounded on the additional concern with the reliability of eyewitness evidence but the reasonable doubt standard is not required and, to some extent, burdens of proof are placed on the defendant. The "values" underlying the confession cases are no more extensive or important than the values served by other exclusionary rules.

The petitioner claims that an accused's confession will likely have greater importance in the trial than will other forms of evidence excluded by constitutional man-

date. It is difficult, of course, for any reviewing court to weigh generally the relative importance of evidence in criminal cases. Reviewing courts do not, except for certain uncommon advisory opinion provisions in a few states, entertain appeals from acquittals. It is impossible to judge the effect of evidence when one sees only the records of convictions. The words of one trial judge in this regard are appropriate here:

> "Any evidence which is illegally obtained may be damning, so that the decision cannot turn on the importance of a confession in a case. Frequently, having lost on a motion to suppress, the defendant's chance of avoiding conviction is hopeless. A 'Confession' may contain exculpatory material, be incomplete, or be unreliable so that it is no more the equivalent of a plea of guilty than is key evidence illegally obtained. Certainly the burden of proof at a preliminary hearing should not depend upon how critical the evidence sought to be suppressed may be at the trial. The judge is often unable to accurately predict at that stage whether a particular item of evidence will clinch the prosecution's case."

This comment is of special note since it comes from the chief, if not sole, opinion on which the petitioner relies in Point I. A. of his argument. The quote is found in *United States* v. *Schipani*, 289 F. Supp. at 58.

It is clear that many items of proof may be far more damaging that confessions. Many confessions are given only because the suspect realizes that the other evidence against him is overwhelming. The seizure of a large quantity of heroin from the person of the defendant or the finding of stolen jewels in his briefcase or the testimony of an undercover agent or the tapes of defendant's conversations planning or executing a crime will usually cause any confession to pale into insignificance. The testi-

mony of eyewitnesses is thought by many to be more damaging than a confession. The evidence acquired by seizure or given by eyewitnesses rarely contains the kind of self-serving excuses or disclaimers of intent present in many confessions. To the extent that juries may entertain suspicions of the reliability of confessions the defendant is in a better position to argue against the weight of such evidence than he is to argue about the reliability of the comparison of his fingerprints (the securing of which may present a question for the exclusionary rule) with the fingerprints found at the scene of the crime or on a murder weapon.

The petitioner offers no evidence to support his contention that confessions are inherently more damaging than other forms of evidence. No such evidence exists. In many cases confessions may be less important than other forms of evidence. There can easily be overwhelming evidence in a case where no confession was made and cases in which confessions were made can be extraordinarily weak.

In sum, the petitioner's attempted distinction between confessions and other forms of evidence subject to constitutional exclusion is unsupported and ought to fail.

C.

Jackson v. Denno Does Not Require The Application Of A Reasonable Doubt Standard To The Determination Of The Admissibility Of A Confession.

Jackson v. *Denno,* 378 U.S. 368, 395 (1964) held that "a proper determination of voluntariness be made prior to the admission of the confession to the jury." See also *Boles* v. *Stevenson,* 379 U.S. 43 (1964); *Sims* v. *Georgia,* 385 U.S. 538 (1967); *Boykin* v. *Alabama,* 395 U.S. 238

resolution of guilt questions and which is subject to review on appeal.

Finally, it is clear that the Constitution does not protect a defendant from having to make hard choices. *McGautha* v. *California*, 402 U.S. 183, 213 (1971). The defendant has no right to an adjudication that the prosecution's evidence will establish guilt beyond a reasonable doubt before he decides whether to plead guilty. Nor is he entitled to a clear and correct adjudication of the admissibility of the evidence against him before he decides his plea. He may have to decide between risking his life to challenge the procedures used against him and saving his life by submitting and pleading guilty. These kinds of choices a defendant may be compelled to make. See *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970); *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

In particular the decision to testify or to offer a defense is traditionally forced upon a defendant without any adjudication that the evidence against him proves his guilt beyond a reasonable doubt. See *Pierce* v. *United States*, 252 U.S. 239, 251-52 (1920); *Johnson* v. *United States*, 426 F. 2d 651, 653 (D.C. Cir. 1970) (standard for directed verdict is whether evidence could persuade a jury to find guilt beyond a reasonable doubt); *United States* v. *Feinberg*, 140 F. 2d 592, 594 (2nd Cir. 1944) (L. Hand, J.) *cert. denied* 322 U.S. 726 (preponderance of the evidence) Courts do not pass upon questions of credibility on motions for directed verdicts at the end of the prosecution's case and, it is after the denial of such motions that the defendant must choose to testify. He must decide whether to risk not only impeachment

but the possible strengthening of the case against him. *McGautha* v. *California*, 402 U.S. 183, 215-16 (1971); *Johnson* v. *United States*, 426 F. 2d at 655-56. Decisions to testify or to offer a defense are hard decisions and forced decisions and are all made before there is any adjudication based on a reasonable doubt standard. Cf. *Williams* v. *Florida*, 399 U.S. 78, 84-85 (1970). Under the standards established in *McGautha* v. *California*, 402 U.S. at 213-20, a defendant in Illinois who is given a totally separate hearing and adjudication on the issue of voluntariness prior to trial is not placed in an unfair position when he must thereafter choose whether to dispute his confession at trial.

The Illinois procedure does not require a criminal defendant to face unconstitutionally harsh dilemmas nor does it fail to provide for a clear-cut, reliable determination of voluntariness required by *Jackson* v. *Denno*.

II.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE DEFENDANT RECEIVE A JURY TRIAL ON THE ISSUE OF THE VOLUNTARINESS OF HIS CONFESSION.

Duncan v. *Louisiana*, 391 U.S. 145 (1968) imposed the common law right to jury trial embodied in the sixth amendment upon the States. It did not expand the traditional common law function of the jury which was insulated from decisions as to the admissibility of evidence. *Jackson* v. *Denno*, 378 U.S. at 387 n. 13; 3 Wigmore, *Evidence*, § 861, P. 345 (3rd Ed. 1940) (P. 568 in Chadbourn Rev. 1970) (admission of confession is a question for the judge). Nevertheless, petitioner claims that *Duncan* re-

(1969). The Court did not comment on the question of burden of proof. See 378 U.S. at 404-05 (dissenting opinion). It is difficult to conceive that the necessary implication of *Jackson* v. *Denno* is a determination that the standards of proof used to determine the merits of the cause in nearly every important state and federal civil litigation are insufficient to insure a reliable determination of the preliminary question of voluntariness of a defendant's statements.

In *Jackson* the Court ruled that the "overall determination of . . . voluntariness . . . requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence." 378 U.S. at 390. The Court recognized the rights to a "reliable and clear cut determination of . . . voluntariness" 378 U.S. at 391 and "to have an involuntary confession entirely disregarded" 378 U.S. at 389. Neither right was adequately protected by leaving the question of voluntariness to the jury. First, it was impossible to know whether the jury did actually decide the question of voluntariness. 378 U.S. at 379-80. Further, the jury's judgment on the issue of voluntariness was likely to be improperly influenced by their judgment as to the guilt of the defendant and the truthfulness of the confession. 378 U.S. at 381, 386.

The petitioner claims that, in a tactical sense, he is in worse position under the Illinois procedure than he would have been under the old New York procedure. Even if this were so (and it is not), the relative tactical benefit to criminal defendants is scarcely an appropriate criterion for the delineation of constitutional rights. *Jackson* v. *Denno* did not decide that whatever makes it more diffi-

cult to present confessions to the jury is constitutionally required.

The petitioner submits that "many criminal defendants" would prefer the old New York procedure to the present Illinois practice. (Petr's Br. 19). We think this assertion is incredible. At the very least, it is untenable in light of the findings of *Jackson* v. *Denno*. In *Jackson* the Court said:

> "Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness." (378 U.S. at 386).

In essence, under New York procedure it did not matter what the standard of proof of voluntariness was because the practice prevented the defendant from ever getting a hearing on the isolated issue of voluntariness.

The petitioner further argues that the Illinois procedure places a defendant in the same hard dilemma a New York defendant faced in determining whether he wished to testify before the jury on the issue of voluntariness and risk impeachment. The short answer to the argument is that the Illinois defendant is not in the same position. Unlike the New York defendant, he is entitled to a pre-trial determination of voluntariness before the jury even hears the confession. He may give his testimony at a motion to suppress and that testimony cannot be used against him at a trial either in the prosecution's case-in-chief [*Simmons* v. *United States,* 390 U.S. 377, 394 (1968)] or for purposes of impeachment [*People* v. *Luna,* 37 Ill. 2d 299, 308; 226 N.E. 2d 586 (1967)]. The petitioner has received a clear-cut determination on the issue of voluntariness which is isolated from

quires that the jury determine voluntariness.[8]

It has been held that the submission of issues of voluntariness to the jury is not constitutionally required. *United States* v. *Panepinto,* 430 F. 2d 613, 617-18 (3rd Cir. 1970). It also seems that *Jackson* v. *Denno,* implicitly approved the Illinois practice which follows the orthodox rule. 378 U.S. at 378.

Whether *Jackson* v. *Denno* so held is not important for the findings of the Court in *Jackson* v. *Denno* make it abundantly clear that the jury does not and cannot properly resolve questions of voluntariness. To reiterate, the Court found that a jury which considers voluntariness along with the evidence in the whole case[9] is trapped by a procedure that "inevitably injects irrelevant and impermissible considerations . . . into the assessment of voluntariness." 378 U.S. at 386.

The practice in Illinois is to allow the defendant to challenge the weight and credibility of his confession before the jury. In this case, petitioner did just that. (R. 223-26). However, even in those jurisdictions where the jury is supposed to decide voluntariness as well as weight, the jury does not do so. It does the same thing

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8. If the Court were to hold that this is true, it's ruling should be fully prospective (De Stefano v. Woods, 392 U.S. 631 (1968) except, of course, for petitioner in this case. See Stovall v. Denno, 388 U.S. 293 (1967).

9. We do not read petitioner's argument to call for a separate jury at the hearing on the motion to suppress. Yet it seems apparent that only such a jury can be said to have considered voluntariness and decided the issue. Neither Duncan nor existing trial practice nor the best interests of the administration of criminal justice lends support to the notion of a jury trial on motions to suppress.

that the Illinois jury does, it judges the credibility of the confession in light of the circumstances of its making including the circumstances relevant to the issue of voluntariness. *E. g. Illinois Pattern Jury Instructions—Criminal* 3.07 (1968). It is the fundamental teaching of *Jackson* v. *Denno* that this is all a jury can be expected to do.

If it is not clear enough from *Jackson* v. *Denno* that a jury cannot perform the mental gymnastics required in separating questions of voluntariness from questions of truthfulness and guilt, then *Bruton* v. *United States*, 391 U.S. 123 (1968) should remove any doubt. There the Court said that "we explicitly rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore his confession of guilt should they find the confession involuntary." (391 U.S. at 129).

Simply stated, a jury ought not to be constitutionally required to decide a question that this Court recognizes it is incapable of deciding.

CONCLUSION

The respondent Warden asks that the judgments of the United States Court of Appeals for the Seventh Circuit and of the United States District Court for the Northern District of Illinois be affirmed.

Respectfully submitted,

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LEGO *v.* TWOMEY, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 70–5037. Argued November 11, 1971—
Decided January 12, 1972

Following a pretrial suppression hearing at which conflicting evidence was presented as to the voluntariness of a confession that petitioner had given the police, the trial judge, presumably applying the Illinois preponderance-of-the-evidence standard, held the confession admissible, and it was introduced into evidence at the trial, which resulted in petitioner's conviction. The judge had instructed the jury as to the prosecution's burden of proving guilt but did not instruct that the jury had to find the confession voluntary before it could be used in reaching its verdict. In a habeas corpus proceeding petitioner challenged his conviction. The District Court denied relief, and the Court of Appeals affirmed. Petitioner contends, relying upon *In re Winship*, 397 U. S. 358, that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence, or, alternatively, that the admissibility of the confession as evidence in a criminal trial (quite apart from its probative value) had to be determined by a reasonable-doubt standard to protect the values that exclusionary rules are designed to serve. Petitioner also urges that, even though the trial judge ruled on his coercion claim, he was entitled under *Duncan* v. *Louisiana*, 391 U. S. 145, to have the jury decide that issue anew. *Held:*

1. The hearing on the voluntariness of a confession required by this Court's decision in *Jackson* v. *Denno*, 378 U. S. 368, is not designed to implement the presumption of innocence and enhance the reliability of jury verdicts, but to prevent the use of a coerced confession as violative of due process quite apart from its truth or falsity. Consequently, determining the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of *In re Winship, supra*. Pp. 482–487.

2. Petitioner has not demonstrated that admissibility rulings based on the preponderance-of-evidence standard are unreliable or that imposition of any higher standard under expanded exclusionary rules would be sufficiently productive to outweigh the

public interest in having probative evidence available to juries. Pp. 487–489.

3. The procedure followed here comported with the requirements of *Jackson, supra,* and petitioner was not entitled to have the voluntariness issue which had been resolved by the trial judge also submitted to a jury for its separate consideration. Nor did *Duncan, supra,* change the rule that determining the admissibility of evidence is a function of the court rather than of the jury. Pp. 489–490.

Affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 490. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Nathan Lewin, by appointment of the Court, 402 U. S. 928, argued the cause and filed a brief for petitioner.

James B. Zagel, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *Warren K. Smoot,* Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1964 this Court held that a criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. *Jackson* v. *Denno,* 378 U. S. 368. While our decision made plain that only voluntary confessions may be admitted at the trial of guilt or innocence, we did not then announce, or even suggest, that the factfinder at a coercion hearing need judge voluntariness with reference to an especially severe standard of proof. Never-

theless, since *Jackson*, state and federal courts have addressed themselves to the issue with a considerable variety of opinions.[1] We granted certiorari in this case to resolve the question. 401 U. S. 992 (1971).

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[1] State courts which have considered the question since *Jackson* have adopted a variety of standards, most of them founded upon state law. Many have sanctioned a standard of proof less strict than beyond a reasonable doubt, including proof of voluntariness by a preponderance of the evidence or to the satisfaction of the court or proof of voluntariness in fact. *E. g., Duncan* v. *State*, 278 Ala. 145, 176 So. 2d 840 (1965); *State* v. *Dillon*, 93 Idaho 698, 471 P. 2d 553 (1970), cert. denied, 401 U. S. 942 (1971); *People* v. *Harper*, 36 Ill. 2d 398, 223 N. E. 2d 841 (1967); *State* v. *Milow*, 199 Kan. 576, 433 P. 2d 538 (1967); *Barnhart* v. *State*, 5 Md. App. 222, 246 A. 2d 280 (1968); *Commonwealth* v. *White*, 353 Mass. 409, 232 N. E. 2d 335 (1967); *State* v. *Nolan*, 423 S. W. 2d 815 (Mo. 1968); *State* v. *White*, 146 Mont. 226, 405 P. 2d 761 (1965), cert. denied, 384 U. S. 1023 (1966); *State* v. *Brewton*, 238 Ore. 590, 395 P. 2d 874 (1964); *Commonwealth ex rel. Butler* v. *Rundle*, 429 Pa. 141, 239 A. 2d 426 (1968); *Monts* v. *State*, 218 Tenn. 31, 400 S. W. 2d 722 (1966); *State* v. *Davis*, 73 Wash. 2d 271, 438 P. 2d 185 (1968).

Other States, using state law or not specifying a basis, require proof beyond a reasonable doubt. *E. g., State* v. *Ragsdale*, 249 La. 420, 187 So. 2d 427 (1966), cert. denied, 385 U. S. 1029 (1967); *State* v. *Keiser*, 274 Minn. 265, 143 N. W. 2d 75 (1966); *State* v. *Yough*, 49 N. J. 587, 231 A. 2d 598 (1967); *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965); *State* v. *Thundershield*, 83 S. D. 414, 160 N. W. 2d 408 (1968); *State ex rel. Goodchild* v. *Burke*, 27 Wis. 2d 244, 133 N. W. 2d 753 (1965), cert. denied, 384 U. S. 1017 (1966).

Two federal courts have held as an exercise of supervisory power that voluntariness must be proved beyond a reasonable doubt. *Ralph* v. *Warden*, 438 F. 2d 786, 793 (CA4 1970), clarifying *United States* v. *Inman*, 352 F. 2d 954 (CA4 1965); *Pea* v. *United States*, 130 U. S. App. D. C. 66, 397 F. 2d 627 (1967); cf. *United States* v. *Schipani*, 289 F. Supp. 43 (EDNY 1968), aff'd, 414 F. 2d 1262 (CA2 1969), cert. denied, 397 U. S. 922 (1970), requiring the Government to prove beyond a reasonable doubt that certain evidence was not tainted by violation of the Fourth Amendment.

Petitioner Lego was convicted of armed robbery in 1961 after a jury trial in Superior Court, Cook County, Illinois. The court sentenced him to prison for 25 to 50 years. The evidence introduced against Lego at trial included a confession he had made to police after arrest and while in custody at the station house. Prior to trial Lego sought to have the confession suppressed. He did not deny making it but did challenge that he had done so voluntarily. The trial judge conducted a hearing, out of the presence of the jury, at which Lego testified that police had beaten him about the head and neck with a gun butt. His explanation of this treatment was that the local police chief, a neighbor and former classmate of the robbery victim, had sought revenge upon him. Lego introduced into evidence a photograph that had been taken of him at the county jail on the day after his arrest. The photograph showed that petitioner's face had been swollen and had traces of blood on it. Lego admitted that his face had been scratched in a scuffle with the robbery victim but maintained that the encounter did not explain the condition shown in the photograph. The police chief and four officers also testified. They denied either beating or threatening petitioner and disclaimed knowledge that any other officer had done so. The trial judge resolved this credibility problem in favor of the police and ruled the confession admissible.[2] At trial, Lego testified in his own behalf. Although he did not dispute the truth of the confession directly, he did tell his version of the events that had transpired at the

[2] In ruling the confession admissible, the judge stated:

"The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

"I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself."

police station. The trial judge instructed the jury as to the prosecution's burden of proving guilt. He did not instruct that the jury was required to find the confession voluntary before it could be used in judging guilt or innocence.[3] On direct appeal the Illinois Supreme Court affirmed the conviction. *People* v. *Lego*, 32 Ill. 2d 76, 203 N. E. 2d 875 (1965).

Four years later petitioner challenged his conviction by seeking a writ of habeas corpus in the United States District Court for the Northern District of Illinois. He maintained that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence. Although the judge had made no mention of the standard he used, Illinois law provided that a confession challenged as involuntary could be admitted into evidence if, at a hearing outside the presence of the jury, the judge found it voluntary by a preponderance of the evidence.[4] In the alternative petitioner argued that the voluntariness question should also have been submitted to the jury for its separate con-

[3] Illinois followed what we described in *Jackson* v. *Denno*, 378 U. S. 368 (1964), as "the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession . . . ." *Id.*, at 378. While the procedures of all the States could not be neatly classified, we noted that some followed the Massachusetts procedure whereby the judge himself first resolves evidentiary conflicts and determines whether a confession is in fact voluntary. If he is unable so to conclude, the confession may not be admitted into evidence. If judged voluntary and therefore admissible, the jury must also determine the coercion issue and is instructed to ignore a confession it finds involuntary. *Id.*, at 378 n. 8. Other States had adopted the New York procedure at issue in *Jackson*. Our decision in *Jackson* cast no doubt upon the orthodox and Massachusetts procedures but did call into question the practice of every State that did not clearly follow one of these procedures. A thorough tabulation of what States did in the wake of *Jackson* appears in 3 J. Wigmore, Evidence 585–593 (J. Chadbourn rev. 1970).

[4] *People* v. *Wagoner*, 8 Ill. 2d 188, 133 N. E. 2d 24 (1956); *People* v. *Thomlison*, 400 Ill. 555, 81 N. E. 2d 434 (1948).